APPENDIX A

[Filed Dec. 17, 1993]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-3941 c/w 92-3942

IN THE MATTER OF: T-H NEW ORLEANS LIMITED PARTNERSHIP,

Debtor.

T-H NEW ORLEANS LIMITED PARTNERSHIP,

Appellee,

versus

FINANCIAL SECURITY ASSURANCE, INC.,

Appellant.

Nos. 92-3959 c/w 92-3983

IN THE MATTER OF: T-H NEW ORLEANS LIMITED PARTNERSHIP,

Debtor.

T-H NEW ORLEANS LIMITED PARTNERSHIP,

Appellant,

versus

FINANCIAL SECURITY ASSURANCE, INC.,

Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

Before EMILIO M. GARZA, and DeMOSS, Circuit Judges, and ZAGEL,[1] District Judge.

DeMOSS, Circuit Judge:

On its motion, the Court withdraws the opinion issued in this case dated October 7, 1993, and substitutes the following:

I. FACTS AND PROCEDURAL HISTORY

In 1988, TH-New Orleans Limited Partnership (TH-NOLP), a hotel partnership, acquired its major asset, the Days Inn Hotel on Canal Street in New Orleans, Louisiana (the Hotel). In 1989, TH-NOLP sought to restructure the underlying mortgage debt on the Hotel through a mortgage bond financing transaction. To achieve that end, TH-NOLP and six other hotel partnerships, all controlled by Monty Hundley and Stanley Tollman, obtained separate but cross-collateralized and cross-guaranteed first mortgage loans, which were secured by the Hotel and other hotels, in the amount of $87,000,000 from a newly created business trust (the issuer). With the execution of the Mortgage Note and Loan Agreement, TH-NOLP executed a Collateral Mortgage Note, a Collateral Real and Collateral Chattel Mortgage and Assignment of Leases and Rents, a Pledge of Collateral Mortgage Note (the Pledge), and a General Assignment of Accounts Receivable. TH-NOLP also executed a Nonrecourse Guarantee, which guaranteed the payment of the six other borrowers under the loan transaction. TH-NOLP's maximum liability under the Guarantee is limited to the greater of TH-NOLP's net worth on the date of execution of the Guarantee, which was stipulated to be $18,425,000, or

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[1] District Judge of the Northern District of Illinois, sitting by designation.

the net worth of TH-NOLP when the Guarantee is enforced.

To raise the necessary money to make the mortgage loans to TH-NOLP, the issuer issued $87,000,000 in bonds, the payment of which was guaranteed by a surety bond issued by Financial Security Assurance Incorporated (FSA). In return, the issuer of the bonds assigned to FSA all its rights and interest in the security agreements, and authorized FSA to be the "controlling party" and their attorney-in-fact to take whatever actions FSA deemed necessary to exercise its rights under the mortgage loans and related collateral.

By 1990, TH-NOLP and the six other partnerships were in default on the loans. After the parties were unable to reach a settlement, FSA accelerated the Mortgage Note and demanded payment of all amounts due under the Loan Agreement and Guarantee.[2] TH-NOLP filed for bankruptcy soon thereafter.

In the bankruptcy court, FSA filed a motion for relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (2); and a motion for adequate protection or that the Hotel revenues be segregated. On March 19, 1992, the bankruptcy court granted FSA's relief from the stay on the grounds that FSA had shown that the secured property was not necessary to a successful reorganization. That ruling was based on the bankruptcy court's decision that TH-NOLP's plan of reorganization was unconfirmable, which was based on the findings that (1) the plan did not permit FSA to bid the full amount of its debt on the proposed sale of the Hotel, (2) the plan made no provision for FSA's unsecured debt, and (3) TH-NOLP

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[2] Similar notices of default and acceleration were sent to the six other hotel partnerships. Five of the six partnerships filed for bankruptcy and foreclosure has been completed in those cases. The other hotel partnership is currently in foreclosure proceedings in Florida state court.

had improperly classified creditors in its plan. The bankruptcy court also granted FSA's motion for adequate protection or segregation of Hotel revenues. TH-NOLP appealed to the district court, which affirmed the bankruptcy court's order granting FSA relief from the stay, but reversed the bankruptcy court's order granting FSA's motion for adequate protection or segregation of Hotel revenues because it held that FSA did not have a security interest in such revenues. TH-NOLP and FSA now appeal to this court.[3]

II. DISCUSSION

The bankruptcy court's findings of fact are reviewed under a clearly erroneous standard. *In re Missionary Baptist Foundation of America*, 818 F.2d 1135, 1142 (5th Cir. 1987). The bankruptcy court's conclusions of law are "freely reviewable on appeal." *Id.*

1. *Relief from Stay*

TH-NOLP contends that the bankruptcy courts misinterpreted its plan of reorganization and its disclosure statement, which led the court to erroneously conclude that TH-NOLP did not have a reasonable probability of a successful reorganization within a reasonable period of time. Specifically, TH-NOLP contends that the bankruptcy court erred when it interpreted the plan to provide that FSA would be limited to bidding in the secured amount of its claim, as opposed to the full amount of its claim, when the Hotel was sold. Because of that alleged erroneous conclusion, TH-NOLP contends the bank-

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[3] FSA's appeals are in case numbers 92-3941 c/w 92-3942, which has been further consolidated with TH-NOLP's appeals in case numbers 92-3259 and 92-3983. All of the issues are intertwined. Case numbers 92-3941 c/w 92-3942 concern the motion for segregation of hotel revenues or adequate protection. Case number 92-3259 concerns the confirmability of the plan, and case number 92-3983 concerns FSA's motion for relief from stay.

ruptcy court improperly determined that FSA was entitled to relief from the automatic stay to commence foreclosure proceedings against the Hotel.

The provisions of 11 U.S.C. § 362(a) provide an automatic stay against foreclosure proceedings when a debtor files a bankruptcy petition. Relief from the stay is warranted under 11 U.S.C. § 362(d)(2) if:

> (A) the debtor does not have an equity in such property; and
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> (B) such property is not necessary to an effective reorganization.

TH-NOLP concedes that it has no equity in the Hotel. The only disputed issue is whether the Hotel is necessary to an effective reorganization. The term "necessary to an effective reorganization" has been interpreted to mean that the debtor has a reasonable probability of a successful reorganization within a reasonable period of time. *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375 (1988).

In its memorandum opinion, the bankruptcy court found that TH-NOLP owed $16,954,983 to FSA, and that the appraised value of the Hotel was $12,200,000, leaving FSA with a under-secured nonrecourse deficiency claim for approximately $4,754,983.

TH-NOLP's plan proposed to deal with FSA's claim under 11 U.S.C. § 1111(b)(1)(A)(ii), which provides in pertinent part:

> (A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—
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> . . . (ii) such holder does not have such recourse and such property is sold under section

> 363 of this title or is to be sold under the plan.

Section 1111(b)(1)(A) effectively provides undersecured nonresourse creditors, such as FSA, an opportunity to elect to have their claims treated as recourse claims if their debtors retain the secured property. *In re Tampa Bay Associates, Ltd.*, 864 F.2d 47, 50 (5th Cir. 1989). Under subsection (ii), however, a nonrecourse deficiency claim is not treated as a recourse obligation when there is a sale of the collateral at which a creditor may credit bid up to the full amount of its claim. *Id.* However, subsection (ii) may only be utilized when a creditor is entitled to credit bid up to the full amount of its claim, not just the amount of its secured claim. *Id. In re National Real Estate Ltd. Partnership II*, 104 B.R. 968, 974 (Bankr. E.D. Wis. 1989).

FSA's claim against TH-NOLP is a nonrecourse claim; FSA's recourse on its claim is limited solely to the collateral for the debt—the Hotel. The bankruptcy court decided that TH-NOLP's plan did not provide for the treatment of FSA's entire debt because it did not address FSA's nonrecource deficiency claim of $4,754,983; therefore it held that application of subsection (ii) was improper. Accordingly, the bankruptcy court held that the plan was unconfirmable, in that no reasonable prospect for a successful reorganization existed within a reasonable time, and lifted the automatic stay.

We disagree with the bankruptcy court's reading of the plan. Under the plan, TH-NOLP was to retain the Hotel for up to two years, during which time it would "actively market the Hotel and . . . use its best efforts to procure a purchaser . . . for the highest possible purchase price," and if it could not do so it would deed the Hotel to FSA. If a purchaser was found, the plan provided that FSA would be entitled to "credit bid the full allowed amount of its finally allowed claim." Additionally, TH-NOLP's disclosure statement provided:

> [s]ince the Trustee [FSA] is an under-secured, non-recourse creditor and since the Plan provides for, the abandonment and/or sale of the Trustees collateral security, with the Trustee being permitted to credit bid its entire nonrecourse claim prior to any sale, the Trustee will not be permitted to make any election under § 1111(b) of the Code.

Disclosure Statement at 13.

Based on the plain language of the plan and the disclosure statement, we hold that the bankruptcy court erred in holding that the plan was unconfirmable because it did not permit FSA to bid the full amount of its claim, and consequently did not provide for FSA's nonrecourse deficiency claim.

As an additional ground for its ruling, the bankruptcy court held that the plan improperly gerrymandered classes of creditor's claims so as to manipulate the voting process for the purpose of facilitating a cramdown under 11 U.S.C. § 1129 in violation of this court's opinion in *In re Greystone III Joint Venture*, 995 F.2d 1274 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992).[4] We address briefly one aspect of the bankruptcy court's decision.

In *Greystone*, debtor Greystone, whose only asset was an office building, filed for bankruptcy after its creditor, Phoenix Mutual, who had an $8.8 million nonrecourse promissory note, posted the property for foreclosure. When Greystone filed for bankruptcy, it owed Phoenix Mutual $9,325,000, its trade creditors $10,000, and the taxing authorities $145,000. The bankruptcy court valued Phoenix Mutual's secured claim at $5,825,000, which

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[4] The plan cannot be confirmed unless it is approved by two-thirds in amount and more than one-half in number of each impaired class, or at least one impaired class approves the plan and the debtor meets the cramdown requirements of § 1129(b). *See Greystone*, at 1277; 11 U.S.C. §§ 1126(c), 1129(a)(8), and 1129(a)(10).

was the estimated value of the office building. Phoenix was left with an unsecured deficiency of $3,500,000, which was the difference between what the debtor owed Phoenix and its secured claim. The debtor's proposed plan separately classified the nonrecourse unsecured claim of Phoenix and the unsecured claim of the trade creditors. The trade creditors voted to accept the plan, and the bankruptcy court confirmed it, in spite of Phoenix's objections, under the cramdown provision of 11 U.S.C. § 1129.

On appeal, this court held the plan was non-confirmable because it improperly gerrymandered the similar claims of Phoenix and the trade creditors. In reaching this result, the court announced in no uncertain terms the one commandment regarding creditor claim classification:

> . . . thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.

995 F.2d at 1279 (emphasis added).

In the present case, the bankruptcy court's opinion indicates that The Tollman-Hundley Management Group is an affiliate of the TH-NOLP; and it had a general unsecured claim for approximately $356,000, which was classified separate and apart from other general trade creditors. The bankruptcy court inferred that TH-NOLP segregated the Tollman-Hundley Management Group's unsecured claim so that the Tollman-Hundley Group would be able to cast a necessary vote to implement cramdown of the plan over FSA's objections. The bankruptcy court found that TH-NOLP gave no justification for the separate classification of its affiliate's claim, even though it was "substantially similar" to the claims of other general unsecured creditors; therefore it held the plan to be "unfairly discriminatory and inequitable" and "unconfirmable" as presented. But 11 U.S.C. § 1129(a)(10) expressly provides that if a class of claims is impaired under the plan, the plan may be confirmed only if at

least one impaired class has accepted the plan, "determined without including any acceptance of the plan by any *insider*." (emphasis added). None of the parties on appeal addressed the question of whether Tollman-Hundley Management Group was truly an "affiliate" of TH-NOLP and therefore, by definition, an "insider" for purposes of § 1129(a)(10).

Any finding by the bankruptcy court regarding improper classification could have been cured by amendment; but the bankruptcy court denied the request of TH-NOLP to file an amended plan. Consequently, without ruling on the propriety or not of the rulings on improper classification, we think justice will be better served by remanding the issues of confirmability of the plan and relief from the stay to the district court with instructions to remand these issues to the bankruptcy court so that (1) the bankruptcy court can make an express finding as to whether Tollman-Hundley Management Group is an "affiliate" of TH-NOLP; (2) the bankruptcy court can afford TH-NOLP an opportunity to amend the plan if it so desires; and (3) the bankruptcy court can conduct such further hearings as may be necessary to redetermine whether the amended plan shows "a reasonable prospect for a successful reorganization within a reasonable time." *See Timbers of Inwood Forest Associates Ltd., supra.*

2. *Section 552(b)*

FSA contends (and the bankruptcy court held) that the post-petition hotel revenues are its cash collateral and it has a right for such revenues to be segregated for its benefit pursuant to the terms of the Collateral Real and Collateral Chattel Mortgage and Collateral Assignment of Leases and Rents and 11 U.S.C. § 552(b).

Section 552(a) provides the general rule that property acquired by the debtor post-bankruptcy is not subject to a lien created by a security agreement before bankruptcy. Section 552(b), however, provides a significant exception:

> if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, rents, or profits of such property, then such security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable non-bankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § 552(b).

A creditor must meet two requirements under § 552 (b) for a security agreement to survive post-bankruptcy:

1. The security agreement must extend to after-acquired property of the designated categories; and
2. the after-acquired property must fit within the five enumerated categories of § 552(b).

FSA's security agreements satisfy the first requirement. Under the terms of the Collateral Assignment of Leases and Rents, the debtor agreed to:

> . . . transfer, pledge, collaterally assign and deliver unto Mortgagee as security for the payment and performance of the Obligations, and grant a security interest in, all of the right, title, and interest of the Mortgagor in and to all of the following:
>
> (a) The Leases;
> (b) The Rents;
> (c) The Fixtures; and
> (d) The Personality.

The document defined Rents as:

> [a]ll of the rents, revenues, income, proceeds, profits, security and other types of deposits, and other benefits paid or payable and to become due or payable to Mortgagor by parties to any Leases for using, leasing, licensing, possessing operating from, residing in, selling or otherwise enjoying any portion or portions of the Mortgaged Property, together with all cash and noncash proceeds of any or all thereof.

It defined Leases as follows:

> [a]ny and all leases, subleases, licenses, concessions or other agreements written or verbal, now or hereafter in effect, including any FF&E Lease(s), Space Leases (as defined below), Franchise Agreement(s) and license agreement(s) which grant a possessory interest in and to, or the right, license or concession to use, all or any portion of the Mortgaged Property, and all other agreements, such as utility contracts, maintenance agreements, Management Agreement (as defined below) and Service Agreement(s) (as defined below) which in any way relate to the use, occupancy, operation, maintenance, enjoyment, or ownership of all or any portion of such Mortgaged Property, together with any renewal or extension thereof and all leases, subleases, licenses, concessions or other agreements in substitution thereof, together with all cash or noncash proceeds of all or any thereof.

From the above language, it is apparent that FSA's security interest extends to the revenues of the Hotel; and, therefore, satisfies the first requirement of § 552(b).

The crux of the dispute between the parties is whether the revenues fall within the classification of "proceeds, products, offspring, rents, or profits" in § 552(b). More specifically, the issue is whether the Hotel revenues are "rent."

State law defines "rent" for purposes of § 552(b). *See Butner v. United States,* 440 U.S. 48 (1979). Both parties agree that in the present case Louisiana law controls the issue of whether hotel revenues fit within the classification of rent. Both parties also agree that *Pioneer Bank and Trust Co. v. Oeschner,* 468 So. 2d 1164, 1168 (La. 1985), is the dispositive Louisiana case on this issue; however, they interpret it differently.

In *Pioneer Bank,* Oeschner executed a promissory note and collateral mortgage to Pioneer Bank in connection with his purchase of the Superdome Motor Inn. After Oeschner defaulted on the loan, Pioneer Bank sued him to enforce the collateral mortgage and for a writ of sequestration. Oeschner argued that Pioneer Bank did not have a right to sequester the Hotel revenues because it had a lien only on the Hotel property, not the revenue.

The applicable Louisiana Sequestration statute, La. Code Civ. Proc. art. 327, provided:

> [t]he seizure of the property by the sheriff effects the seizure of the fruits and issues which it produces while under seizure. The sheriff shall collect all rents and revenue produced by property under seizure.

Therefore, the decisive question was whether the Hotel revenues, which Pioneer was attempting to seize, were "rents or revenues" within the meaning of the Louisiana sequestration statute. *Pioneer Bank,* 468 So. 2d at 1168. The Louisiana Supreme Court concluded that the statute allowed Pioneer Bank to have the property seized under a writ of sequestration and to collect the revenues produced by the Hotel. In reaching its result, the court reasoned:

> . . . . the revenues paid into Superdome Motor Inn by its guests are, like rent, paid for the use of the property. In that sense, they, like rent, are produced by the property. Second, the mortgage expressly covers all property, movable and immovable, "used in connection with the operation of the . . . . property."

> This combination of facts, i.e., the nature of the revenues and that the mortgage covers all property used in the operation of the property, leads us to conclude that the revenues at issue are "produced by the property."

Pioneer Bank, at 1168 (emphasis added).

In our view, *Pioneer Bank* supports our conclusion here that hotel revenues are sufficiently "like rent" under Louisiana law to be included within the term "rents" in § 552(b). Therefore, we hold that FSA is entitled to have the Hotel revenues segregated for its benefit.

We have carefully and exhaustively searched the legislative history of § 552(b) for any indication that in using the term "rents" Congress intended to exclude revenues generated by hotels and motels for the use of their lodging rooms by third parties; but we have been unable to locate even a scintilla of such intent. Clearly, in our view, the term "rents" would include revenues generated by apartments, office buildings, shopping centers, and warehouses for the use and occupancy of space within such facilities, and, absent some clear and express indication by the Congress that the word "rents" was not to include revenues from hotels and motels, we see no reason to provide such exclusion by judicial interpretation. To the contrary, given the other broad, generic terms utilized by Congress in § 552(b), we believe a generic interpretation of "rents" as "payments made for the use of property" is most consistent with congressional intent.

TH-NOLP contends that hotel revenues are "accounts receivable" under the Louisiana Accounts Receivable Act. *See e.g., In re Texas Tri-Collar, Inc.*, 29 B.R. 724 (Bankr. W.D. La. 1983). In that statute, "accounts receivable" are defined as follows:

> "[a]ccounts receivable" or "account" means and includes all or any part of any indebtedness owing to the assignor in connection with all or any part of the

> assignor's business, profession, occupation or undertaking, including but not limited to the sale of goods or the performance of services or the leasing of a movable property subject to the Louisiana Lease of Movables Act. "Accounts receivable" or "account" shall not mean or include:
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> (a) Indebtedness due to or arising out of claims in tort;
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> (b) Indebtedness evidenced by a promissory note, other than a lease note, or negotiable instrument; or
>
> (c) Indebtedness due to or arising out of the leasing of immovable property.

La. R.S. § 9.3101(1).

According to TH-NOLP, the revenue received by a hotel operator represents the payment by hotel guests on indebtedness owing to the hotel operator in connection with hotel business, not "rent" of the hotel property. TH-NOLP contends that it takes the combined efforts of its numerous skilled and dedicated employees to generate revenues from the Hotel, and without the combined efforts of these individuals the "Hotel could not generate a dime of revenue." Ultimately, TH-NOLP's premise is that hotel revenues are dependent upon and generated from the service aspect of the hotel, and, as such are in the nature of accounts receivable.

We disagree. First of all, sub-item (c) of the Louisiana statutory definition quoted above expressly eliminates "indebtedness due to or arising out of the leasing of immovable property"; and in our view, revenues received by hotel and motel operators for the use of their rooms fall squarely under this exclusion. Secondly, in our view, the physical condition of the Hotel and its location are more essential to the Hotel's ability to generate revenue than the services it provides. Take away the land and the bricks and mortar, and there is nothing upon which the

collateral services of entertainment, food, recreational activities, laundry and cleaning could exist. The converse is not true, for many chains of motels have been successful in providing "simply a good night's rest at the most economical price." Therefore, we reject the notion that a hotel's revenues are so intertwined and dependent on the hotel's service that one cannot conclude the revenues are rent for purposes of § 552(b).

We recognize that several bankruptcy and district court decisions have reached a result contrary to that we reach here. *See, e.g., In re Punta Gorda Associates,* 137 B.R. 535 (Bankr. M.D. Fla. 1992); *In re GGVXX, Ltd,* 130 B.R. 322 (Bankr. D. Colo. 1991). However, those decisions involved the interpretation of other states' statutory provisions regarding classification of rent, and thus they are of little significance in the present case where we are applying Louisiana law. Morover, we are persuaded by the clear language of the loan documents that the borrower intended, and the lender expected, that the Hotel revenues would stand as security for the loan. The income flow generated by the Hotel revenues are an integral part of the value that the lender assigns to the collateralized property. If, as indicated by *Pioneer,* a lender may reach and control revenues from a hotel for purposes of Louisana's—sequestration remedies, we can see no reason for depriving that same lender of the benefit of his expressly bargained-for-security when the question is application of § 552(b) in bankruptcy. To deprive the lender of what he bargained for at closing, especially when that expectation matches the intent of the borrower, is inequitable and ignores widely accepted lending practices of the business community.

III. CONCLUSION

We reverse the holding of the bankruptcy court that the plan was unconfirmable because it did not permit FSA to credit bid the full amount of its claim. We VACATE the holding and REMAND the issues of confirmability of the plan and relief from stay for redetermination by the bankruptcy court. We also hold that the district court erred in reversing the judgment of the bankruptcy court which allowed FSA to segregate the Hotel revenues for its benefit. Accordingly, we VACATE in part and REVERSE in part, and REMAND this case to the district court with instructions to REMAND to the bankruptcy court for further proceedings consistent herewith.

APPENDIX B

[Filed Oct. 8, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 92-1377
c/w: 92-1378
92-1379
92-1764

Section: E/1

IN RE: T-H NEW ORLEANS LIMITED PARTNERSHIP

(Bankruptcy No. 91-10681-K

IN RE: T-H NEW ORLEANS LIMITED PARTNERSHIP,
Debtor-Appellant
versus
FINANCIAL SECURITY ASSURANCE, INC.,
Creditor-Appellee)

MEMORANDUM OPINION AND ORDER

This Court has jurisdiction over these four appeals from the United States Bankruptcy Court pursuant to 28 U.S.C. § 158(a). The Appellant-Debtor, Tollman-Hundley New Orleans Limited Partnership (T-H NOLP), filed a voluntary Chapter 11 petition in the bankruptcy court on February 25, 1991 and since that date has op-

erated as a debtor-in-possession. The bankruptcy judge ruled on two motions in favor of the Appellees, Financial Security Assurances, Inc. (FSA), which are the basis of these appeals. The appeals have been consolidated because of substantial overlap in their content. Essentially, the appeals are, *inter alia*:

1. In civil actions 92-1377 and 92-1379, T-H NOLP appeals the bankruptcy judge's grant of relief to FSA from the stay issued pursuant to 11 U.S.C. § 362(d)(2) in a Memorandum Opinion and Order of March 19, 1992. T-H NOLP also appeals the March 25, 1992 denial of the motion for reconsideration and for a stay.

2. In civil actions 92-1378, 92-1379 and 92-1764, T-H NOLP appeals the bankruptcy judge's grant of FSA's motion for adequate protection or segregation of hotel receipts and the determination that T-H NOLP hotel receipts were subject to FSA's security interest in a March 23, 1992 Memorandum Opinion and May 1, 1992 Order.[1]

BACKGROUND FACTS

T-H NOLP, the Appellant-Debtor, is a limited Delaware partnership. The property of the Debtor, consisted primarily of a hotel property operated under the "Days Inn" trade name known as the Days Inn-Canal Street located in New Orleans, Louisiana. The Debtor's primary business is its ownership of and investment in the hotel. The debtor does not manage the day to day operations of the hotel; instead, it contracts with the Tollman-Hundley Management Services, Inc., an affiliate of the Debtor, to do so.

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[1] Another issue on appeal is whether the bankruptcy court correctly denied approval of the debtor's disclosure statement. The court finds no error and also notes that any error would be harmless.

The Debtor refinanced its operations on February 1, 1989. A vital part of the bond refinancing required the Debtor to enter into a Loan Agreement for $87 million with the Lender.

To secure its financial obligations to the Lender the Debtor issued a collateral real and collateral chattel mortgage with a collateral assignment of "Leases" and "Rents" (Collateral Mortgage). In addition, on February 15, 1989 there was a General Assignment of Accounts Receivable (General Assignment) and Notice of Assignment regarding the General Assignment. The Debtor's financial obligations to the Lender were further secured by a non-recourse guarantee which limited the Debtor's liability. The security interest apparently included the hotel itself, real, personal and other property, and all other income generated from the hotel.

The Lender in turn entered into an inter-creditor agreement with Financial Security Assurance, Inc. (FSA), a New York Stock insurance company and a major creditor of Debtor's estate, and others assigning to them all of the Lender's interests in mortgage notes, mortgage loans, collateral mortgage note, Collateral Mortgage, pledges and guarantees. FSA was the controlling party in the inter-creditor agreement.

FSA issued a surety bond to the bond purchasers which guaranteed payment of principal and interest.

RECOMMENDATION

I. STANDARD OF REVIEW

In this matter this district court must act as an appellate court. Depending on the nature of the bankruptcy judge's holding being reviewed a different standard of review applies. *Matter of HECI Exploration Co., Inc.*, 862 F.2d 513, 518 (5th Cir. 1988).

There are three well settled standards. First, matters within the bankruptcy court's discretion are reviewed un-

der an abuse of discretion standard. Second, findings of fact are reviewed under a clearly erroneous standard. Findings of fact lose the insulation of the clearly erroneous standard when such findings are based upon an improper legal standard, or a proper one improperly applied. *In re Missionary Baptist Foundation,* 818 F.2d 1135, 1142 (5th Cir. 1987). Finally, conclusions of law are freely reviewable. *Matter of HECI,* 862 F.2d at 518.

The appeals based on the relief from the stay (i.e., Civil Actions 92-1377 and 92-1379) should be reviewed under a clearly erroneous standard because the decision was based on a finding of fact. On the other hand, the appeals regarding the grant of the motion for adequate protection, or segregation of the hotel receipts, and the ruling that the hotel receipts were subject to FSA's security interest (i.e., Civil Actions 92-1378, 92-1379 and 92-1764) are freely reviewable as conclusions of law.

II. Civil actions 92-1377 and 92-1379—Relief from the stay issued pursuant to 11 U.S.C. § 362(d)(2) and Denial of Debtor's Motion for Reconsideration and for a Stay.

A. Standard of Review

The bankruptcy judge's decision to grant FSA relief from the stay was based on the facts presented to him, therefore the decision must be reviewed under the clearly erroneous standard. The decision was not clearly erroneous as discussed herein.

B. The Bankruptcy Court's Decision to Grant Relief from the stay

In order to grant relief from a stay of an act against property two conditions must be met. First, the Debtor must not have an equity in the property. Second, the

property must not be necessary to an effective reorganization. 11 U.S.C. § 362(d)(2)(A) and (B).

1. Equity

FSA stipulated that it has no equity in the hotel.

2. Property Necessary to an Effective Reorganization

An effective reorganization requires relief from the automatic stay if there is no reasonable likelihood of reorganization due to creditor dissent or feasibility considerations. 2 *Collier on Bankruptcy* § 362.07 (15th ed. 1990). In order to reach its decision the bankruptcy court analyzed the evidence concerning T-H NOLP's reorganization plan, and the plan itself.

The bankruptcy court determined that it was not an effective reorganization plan because there was no reasonable prospect for a successful reorganization within a reasonable time before allowing the stay to remain in effect. Memorandum Opinion March 19, 1992. Courts require the Debtor to do more than manifest unsubstantiated hopes for a successful reorganization. *United Savings Association v. Timbers of Inwood Forest Assocs., Inc.*, 484 U.S. 365, 371-374 (1988) (determining whether undersecured creditors are entitled to compensation under 11 U.S.C. § 362(d)(1) for the delay caused by the automatic stay in foreclosing on their collateral).

The bankruptcy court's factual finding that there was "no reasonable possibility of a successful reorganization within a reasonable time" is not clearly erroneous. *See* Memorandum Opinion March 19, 1992 at 6-10. The evidence and the proposed plan of reorganization under 11 U.S.C. § 1111(b)(1)(A)(ii) do not indicate any reasonable prospect for a successful reorganization within a reasonable period of time. Further, there was no error in finding that FSA was entitled to a deficiency claim against the Debtor's estate.

Finally, the automatic stay was lifted by the operation of the bankruptcy court's March 19, 1992 Order since FSA waived any right it may have had to insist upon the thirty day hearing requirement of § 362(e). *See In re Small*, 38 B.R. 143 (Bankr. D. Md. 1984) (creditor waived thirty-day hearing requirement under 362(e) when it sought in a single motion, not only relief from the automatic stay, but also other relief, including adequate protection).

C. Other Issues

Based on its findings in the March 19, 1992 Memorandum Order and Order the bankruptcy judge denied approval of the Debtor's motion for reconsideration and for a stay on March 25, 1992. This decision was proper because it was premised on the factual determinations of the reorganization plan.[2]

III. CIVIL ACTIONS 92-1378, 92-1379 and 92-1764

A. Summary of Arguments

Prior to the filing of the bankruptcy petition the Debtor and FSA executed various security instruments. The effect of the filing of the bankruptcy petition on the security instruments is the basis of these appeals.

The bankruptcy court held that the hotel receipts of the Debtor which accrued post-petition were "the proceeds, product, offspring, rents, or profits" of property in which FSA had a pre-petition security interest. Therefore, under 11 U.S.C. 552(b), FSA argued that its security interest extends to the hotel receipts acquired by the estate after the commencement of the case and that was entitled to adequate protection, or segregation of post-petition hotel receipts under 11 U.S.C. § 363.

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[2] The bankruptcy judge also denied T-H NOLP's request to file an amended plan of reorganization and disclosure statement.

However, T-H NOLP claims that pursuant to 11 U.S.C. 552(a) the hotel receipts are not subject to the pre-petition security interest because they are not "proceeds, product, offspring, rents, or profits." Rather, the hotel receipts are "accounts receivable" as defined by Louisiana State law. La. R.S. 9:3101. Therefore, the debtor contends that FSA is not entitled to any adequate protection or segregation of post-petition receipts under 11 U.S.C. § 363 because FSA has no recognizable security interest in the hotel receipts.

B. Relevant Considerations

1. Standard of Review

The bankruptcy judge's decision to segregate the hotel receipts is based on an application of law, therefore it is freely reviewable.

2. Terms of the Security Agreement Between FSA and T-H NOLP

FSA has a security interest in the hotel. Its security interest includes a mortgage over the property, plant fixtures and equipment of the hotel and extends to "any right, title, interest or estate hereafter acquired by [the Debtor] in . . . Land, Buildings, Leasehold Estate, Fixtures, Personalty, Lease and Rents and all cash and non-cash proceeds of any and all thereof." Original Brief of Appellee, CA 92-1378, Appendix A at p. 6. More specifically, the terms of the Collateral Mortgage require the Debtor to:

> [T]ransfer, pledge, collaterally assign and deliver unto Mortgagee as security for the payment and performance of the Obligation, and grant a security interest in, all of the right, title and interest of Mortgagor in and to all of the following:
>
> (a) the leases;
>
> (b) the rents;

(c) the fixtures; and

(d) the personalty.[3]

Id. at p. 52. The collateral mortgage defines the "leases" and "rents" very broadly:

> *Leases*: Any and all leases, subleases, licenses, concessions or other concessions or other agreements written or verbal, now or hereinafter in effect, including any . . . license agreements which grant . . . the right, license or concession to use, all or any portion of the Mortgaged Property, and all other agreements . . . which in any way relate to the use, occupancy, operation, maintenance, enjoyment or Property . . . together with all cash or noncash proceeds . . . .
>
> *Rents*: All of the rents, revenues, income, proceeds, profits, security and other types of deposits, and other benefits paid or payable and to become due payable to Mortgagor by parties to any Leases for using, leasing, licensing, possessing, operating from, residing in, selling or otherwise enjoying any portion or portions of the Mortgaged Property, together with all cash and noncash proceeds . . . .

Id. at pp. 15, 18. Moreover, the accounts receivable are also subject to a separate General Assignment of accounts receivable. *See id.*, Appendix B.

3. The Law: 11 U.S.C. § 552

Section 552(a) and (b) deal with the post-petition effect of security interests and govern the determination of whether these pre-petition security agreements encompass hotel receipts generated by the Debtor after the filing of its petition for relief. Section 552(a) states the general rule:

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[3] The collateral mortgage defines personality to include accounts receivable.

> Except as provided in subsection (b) . . . property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

Section 552(b) creates an exception consisting of three parts:

1. ". . . [I]f the debtor and a secured party enter into a security agreement before the commencement of the case and if the security agreement extends to property of the debtor acquired before the commencement of the case and
2. "to proceeds, product, offspring, rents, or profits of such property,
3. "then such product, offspring, rents or profits acquired by the estate after commencement of the case to the extent provided by such security agreement and by applicable non-bankruptcy law, except to the extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise."

C. Analysis

The real problem in this case is to determine the reach of the comprehensive security agreement.

The crux of T-H NOLP's claim is that the bankruptcy judge's decision places too much emphasis on the security agreement. T-H NOLP argues, in effect, that this emphasis allows the appellees to circumvent the purpose of the law through deft definition drafting in the security agreement.

A. Parts 1 and 2 of the 552(b) Exception

In this case the security agreement clearly defines rents and leases so broadly as to characterize the hotel receipts or revenues as part of the security interest covered by the Collateral Mortgage (with the collateral assignment of hotel receipts) before the petition filing.

B. Part 3 of the 552(b) Exception

Under the doctrine of *Butner v. United States,* 440 U.S. 48 (1979) (whether a security interest in property extends to rents and profits derived from the property is one resolvable by reference to state law) this court is bound by state law on the issue of whether hotel receipts fall within the classifications of security listed in the security agreements.

Louisiana law as articulated in *Pioneer Bank and Trust Co. v. Oechsner,* 468 So.2d 1164 (La. 1985) suggests that hotel receipts are revenues. In *Pioneer* the Louisiana Supreme Court determined, for purposes of the Louisiana Code of Civil Procedure article 327 (which allows the sheriff to collect "rents" and "revenues" from seized property), that hotel room receipts are not "rents." Hotel receipts are revenues. *See also In the Matter of Thomas Jefferson Construction, Pelican Homestead and the Savings Association v. Thomas Jefferson Construction Corporation and Progressive Bank and Trust,* Bankruptcy No. 86-03431, Adversary No. 88-0306 (proceeds generated from daily room rentals of a lodging facility constituted "revenues" under security documents).

FSA argues that the assignment of the revenues in the Collateral Mortgage extends to the revenues of any "Leases" of the property. "Leases" are defined in the agreement to include the "use" or "occupancy" of property. The bankruptcy court found that, as revenues from the "leasing" of the mortgaged property, the hotel receipts at issue are "Rents" under the security agreement

and therefore subject to FSA's security interest as defined by the agreement.

The security agreement, by virtue of drafting prowess, defines the revenues to be "Rents" thus the section 552 (b) exception to these post-petition hotel receipts applies to the "proceeds, product, offspring, rents or profits."

Appellant's raise a strong argument for reversal of the bankruptcy judge's order. The bankruptcy judge did not consider whether or not the hotel receipts could fall within the General Assignment of Accounts Receivable because he found that the hotel receipts fell within the collateral assignment of revenues in the Collateral Mortgage. Memorandum Opinion March 23, 1992, 8 n. 5. The legislature does not define hotel receipts, however, they may be characterized as "accounts receivable." La. R.S. 9:3101. As accounts receivable they do not fall within the statutory exception under 11 U.S.C. § 552(b).

T-H NOLP argues that hotel receipts or revenues are not rents. *Pioneer Bank*, 468 So.2d at 1164. However, revenues fall within the rubric of "accounts receivable." "Accounts receivable" is defined under La. R.S. 9:3101 (1) as:

> Accounts receivable or account means and includes all or any part of any indebtedness owing to the assignor in connection with all or any part of the assignor's business, profession, occupation or undertaking, including but not limited to the sale of goods or the performance of services . . . .

T-H NOLP acknowledges the paucity of Louisiana case law specifically classifying hotel receipts or revenues as "accounts receivable." However, it argues that under Article 9 of the Uniform Commercial Code, "account" is more narrowly defined than the Louisiana Accounts Receivable Act to include hotel revenues. Louisiana Commercial Laws, La. R.S. 10:9-101. *See also* Original Brief of Appellant, CA 92-1378, 10-11 n. 2-3.

Cases interpreting the definition of "account" under the UCC have held that hotel room revenues constitute accounts. *See, e.g., U.S. v. PS Hotel Corp.*, 404 F.Supp. 1188, 1192 (E.D. Mo.), *aff'd per curiam*, 527 F.2d 500 (8th Cir. 1975); *In re Northview Corp.*, 130 B.R. 543, 546 n.4 (Bankr. App. 9th Cir. 1991) (and cases cited therein). Applying the narrower UCC definition of "account," the court concludes that the broad definition of "accounts receivable" contained in La. R.S. 9:3101 includes T-H NOLP's hotel receipts.

As an account receivable, FSA's security interest is governed entirely by the Louisiana Accounts Receivable Act and therefore the exclusive method by which FSA or its predecessors-in-interest, perfected the security interest was pursuant to this Act. In 1989 the Louisiana Accounts Receivable Act provided that:

> A. This part is intended to provide an additional method of assigning accounts receivable, and shall not have the effect of repealing any other provision of law authorizing the assignment of accounts receivable. It is intended, however, that if the parties file a notice of assignment, then, except as provided in Subsection B, this Part shall provide the exclusive method by which the assignee of those accounts receivable may perfect a security interest in those accounts.

La. R.S. 9:3109(A) (1983) (emphasis added).

FSA has no post-petition security interest in the hotel receipts because they are "accounts receivable" pursuant to state law. The parties executed a General Assignment of those accounts receivable and filed a Notice of Assignment with respect to it. This assignment applied only to the hotel receipts pre-petition. Any hotel receipts generated after the petition filing were new accounts receivable not subject to the General Assignment. Perfection of a security interest through a collateral assignment

of hotel receipts in the Collateral Mortgage was pre-empted by the General Assignment under La. R.S. 9:3109(A) when FSA's predecessor-in-interest filed the Notice of Assignment.

Section 552(a) provides that, as a general matter, property acquired by an estate after the commencement of the case is not subject to any lien resulting from any security agreement entered into by a Debtor before the commencement of the case. Therefore, FSA does not meet the criteria for the § 552(b) exception.

FSA has no post-petition security interest in the hotel receipts, thus there can be no perfection for post-petition perfection purposes. Since FSA has no perfected post-petition security interest, the property, as defined in 11 U.S.C. § 363(a), is not "cash collateral." The property is not property "in which the estate and an entity other than the estate have an interest . . . ." 11 U.S.C. § 363 (a). FSA is not entitled to any adequate protection or segregation of those hotel revenues under 11 U.S.C. § 363(a).

In a recent Ninth Circuit case, *In re Chesterfield Century City Ltd. Partnership,* Civ. No. 2-92-119 GEB, the court dealt with issues and facts that closely parallel those of the present case. *Chesterfield Century City* is a bankruptcy proceeding involving hotel partnerships which are co-borrowers under a bond financing which forms the basis for the claims of Financial Security Assurance, Inc. (FSA) in both that case and the case at bar. The bankruptcy court in *Chesterfield Century City* held that FSA's liens on hotel revenues did not continue to encumber such revenues earned after the debtors filed their chapter 11 bankruptcy petitions. On appeal, the district court affirmed the bankruptcy court decision.

The district court found that hotel revenues are "accounts receivable" and not rents. *Chesterfield,* Civ. No. 2-92-119 at pp. 5-7. Furthermore, "accounts" cannot be

transformed into "rents" solely by definitional fiat in FSA's collateral security documents. *Id.* at pp. 7-8. Therefore, because the exception of § 552(b) does not apply, FSA had no security interest in the debtor's post-petition hotel revenues. *Id.* at p. 7. FSA's policy arguments were rejected as contrary to the express provisions of § 552(b).

The *Chesterfield* court held in pertinent part:

> Obviously, it was in FSA's best interest to draft the agreement in such a manner as to assure it the most protection in the event that debtors defaulted on their loan obligations. Once debtors have declared bankruptcy, however, the meaning of the 552(b) exceptions must be interpreted in accordance with the applicable state law—not the alleged pre-petition intent of the parties. To hold otherwise would be an invitation to creditors to avoid the mandate of section 552(a) by substituting their own definitions of collateral for those provided for by existing law. This would seriously jeopardize the rights of unsecured creditors in situations similar to the case at bar.

Id. at 7-8.

We follow the decision of the Ninth Circuit. "As Article III courts, the district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction." *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990).

CONCLUSION

We affirm the bankruptcy court's decision to grant relief to FSA from the stay issued pursuant to 11 U.S.C. § 362(d)(2) and the denial of the motion for reconsideration and for a stay for the aforementioned reasons.

We reverse the bankruptcy court's decision to segregate the post-petition hotel receipts because the T-H

NOLP's hotel receipts were not a perfected post-petition security interest. FSA is ordered to return and pay over to T-H NOLP all payments made by T-H NOLP to FSA in accordance with the bankruptcy court's May 1, 1992 Order.

Judgment shall be entered accordingly.

New Orleans, Louisiana, October 7, 1992.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

[Filed Oct. 8, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 92-1377
c/w: 92-1378
92-1379
92-1764

Section: E/1

IN RE: T-H NEW ORLEANS LIMITED PARTNERSHIP

(Bankruptcy No. 91-10681-K

IN RE: T-H NEW ORLEANS LIMITED PARTNERSHIP,
Debtor-Appellant

versus

FINANCIAL SECURITY ASSURANCE, INC.,
Creditor-Appellee)

JUDGMENT

Considering the records of these consolidated appeals from the United States Bankruptcy Court, Eastern District of Louisiana, the briefs of the parties, the Memorandum Opinion and Order entered this date, and the law, for the reasons assigned,

IT IS ORDERED, ADJUDGED and DECREED that the decision of the bankruptcy judge be AFFIRMED IN PART and REVERSED IN PART as follows:

(1) The bankruptcy court's decision to grant relief to Financial Security Assurance, Inc. ("FSA"), to deny the motion for reconsideration and to deny a stay, be and is hereby AFFIRMED;

(2) The bankruptcy court's order to T-H New Orleans Limited Partnership ("T-H NOLP") to segregate post-petition hotel receipts and to pay them to FSA be and is hereby REVERSED.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that FSA return to T-H NOLP all payments made by FSA in accordance with the bankruptcy court's May 1, 1992 order.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stay previously imposed herein shall remain in effect for *30 days* from the date of entry of this judgment. On the thirty-first day, the stay shall terminate. Any request for a further stay of this judgment shall be made in accordance with the Federal Rules of Civil and Appellate Procedure and the Local Rules.

New Orleans, Louisiana, October 7, 1992.

United States District Judge

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

Number 91-10681

Chapter 11

IN THE MATTER OF
T-H NEW ORLEANS LIMITED PARTNERSHIP,
Debtor

MEMORANDUM OPINION

This matter came before the Court as a hearing on the motion of Financial Security Assurance, Inc. ("FSA") for segregation of hotel receipts, or alternatively, for adequate protection. The Debtor in this matter, T-H New Orleans Limited Partnership ("T-H New Orleans" or "the Debtor") opposes the motion. After considering the argument of counsel at the hearing, the evidence submitted, the memoranda submitted by the parties, and the applicable law, this Court enters the following Memorandum Opinion.

The Debtor filed a voluntary Chapter 11 petition in this Court on February 25, 1991, and since that date has operated as a debtor-in-possession. Prior to the filing, the Debtor and FSA executed various security instruments including a collateral real and collateral chattel mortgage and assignment of leases and rents ("collateral mortgage") and an assignment of accounts receivable. The effect of the filing of the bankruptcy petition on these security instruments is the basis of FSA's motion. FSA claims the hotel receipts of the debtor which have accrued

post-petition are the "proceeds, product, offspring, rents, or profits" of property in which it has a pre-petition security interest; accordingly, under 11 U.S.C. § 522(b) its security interest extends to the hotel receipts acquired by the estate after the commencement of the case. The Debtor claims, however, that post-petition hotel revenues are not subject to pre-petition security interests, and therefore, 11 U.S.C. § 522(a) prevents FSA from claiming an interest in the revenues.

FSA has a security interest in the hotel. Its security interest includes a mortagage over the property, plant, fixtures, and equipment of the hotel and extends to "any right, title, interest or estate hereafter acquired by [the Debtor] in . . . Land, Buildings, Leasehold Estate, Fixtures, Personalty, Leases and Rents and all cash and non-cash proceeds of any and all thereof." Exhibit D at p. 6.

More specifically, under the terms of the collateral mortgage, the Debtor agreed to:

> "transfer, pledge, collaterally assign and deliver unto Mortgagee as security for the payment and performance of the Obligation, and grant a security interest in, all of the right, title and interest of Mortgagor in and to all of the following:
>
> (a) the leases;
>
> (b) the rents;
>
> (c) the fixtures; and
>
> (d) the personalty.[1] "

Exhibit D at p. 52.

The terms "leases" and "rents" are broadly defined as follows in the collateral mortgage:

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[1] Personalty, as defined in the collateral mortgage, includes accounts receivable.

> "*Leases:* Any and all leases, subleases, licenses, concessions or other agreements written or verbal, now or hereinafter in effect, including any . . . license agreements which grant a possessory interest in and to, or the right, license or concession to use, all or any portion of the Mortgaged Property, and all other agreements . . . which in any way relate to the use, occupancy, operation, maintenance, enjoyment or ownership of all or any portion of such Mortgaged Property . . . together with all cash or noncash proceeds of all or any thereof . . . ."
>
> "*Rents:* All of the rents, revenues, income, proceeds, profits, security and other types of deposits, and other benefits paid or payable and to become due or payable to Mortgagor by parties to any Leases for using, leasing, licensing, possessing, operating from, residing in, selling or otherwise enjoying any portion or portions of the Mortgaged Property, together with all cash and non cash proceeds of any or all thereof."

Exhibit D at pgs. 15, 18.

Moreover, the accounts receivable are also subject to a separate assignment of accounts receivable. Exhibit G.

Sections 552(a) and (b) of the Bankruptcy Code, concerning the postpetition effect of security interests, govern the determination of whether these prepetition security agreements encompass hotel receipts generated by the Debtor after the filing of its petition for relief. Section 552(a) provides as follows:

> "Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case."

Sections 552(b) states in pertinent part:

> ". . . [I]f the debtor and a secured party enter into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, rents, or profits of such property, then such security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to the extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise."

The inquiry this Court must make for purposes of this opinion is three-fold. First, this Court must determine if the security interest created by the security agreement extends to property of the Debtor acquired before the commencement of the case. If so, then this Court must also determine if the security interest also extends to the proceeds, product, offspring, rents or profits of such property. If this inquiry is answered affirmatively, the third issue to decide is whether or not the hotel receipts fall within the categories of proceeds, product, offspring, rents, or profits delineated in the security agreement. This third issue is governed by state law. *In re Mid-City Hotel Associates,* 114 B.R. 634, 639 (Bankr. D. Minn. 1990) *citing Butner v. United States,* 440 U.S. 48, 54-55, 99 St.Ct. 914, 917-18, 59 L.Ed.2d 136 (1979).

Initially, this Court finds that the collateral mortgage extends to the property of the Debtor, the hotel, which was acquired before the commencement of the case. Furthermore, the assignment of rents in the body of the collateral mortgage gives FSA the general right to the "rents, revenues, income, proceeds, profits, security, and other types of deposits, paid or payable" to the Debtor

by parties to any leases pertaining to the mortgaged property. The term "lease" is broadly defined to include "all other agreements . . . which in any way relate to the use . . . [or] . . . occupancy of any portion of the mortgaged premises and all cash or noncash proceeds of any or all thereof." [2] Accordingly, the second inquiry is satisfied, as the security interest extends to the proceeds, product, offspring, rents, or profits of the secured property. This Court must therefore look to state law to determine if the hotel receipts fall within the classes of proceeds, product, offspring, rents or profits of the hotel. These classes are specifically referred to in the security documents as the "rents, revenues, income, proceeds, profits, security, and other types of deposits, paid or payable." Consequently, the relevant inquiry is whether, under state law, hotel receipts are "rents, revenues, income, proceeds, profits, security" or "other types of deposits, paid or payable" from leases of the secured property.

This Court has found, and counsel has pointed out, only one such Louisiana case dealing with the classification of hotel receipts. In *Pioneer Bank and Trust Company v. Oechsner*, 468 So.2d 1164 (La. 1985), the court examined the issue of whether or not the revenues which the plaintiff attempted to seize under a writ of sequestration were "rents or revenues" produced by the property, a hotel. Under Louisiana Code of Civil Procedure Articles 327, the seizure of the property by the sheriff effects the seizure of the fruits and issues the property produces, and therefore, the sheriff shall collect all "rents and revenues" produced by the property. The court noted the difference between the legal relationship of an innkeeper and his guest and that of a landlord and tenant, finding that the principal distinction was "that the tenant ac-

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[2] After reading the definition of "leases" carefully, this Court finds that this phrase does not limit FSA to recovery of rents from leasehold tenants of the Debtor. *See In re Mid-City Hotel Associates*, 114 B.R. at 639.

quires an interest in the real estate and has the exclusive possession of the lease premises, while the lodger acquires no estate and has merely the use without the actual or exclusive possession." *Id.* at 1168 *citing Walling v. Peavy-Wilson Lumber Co.*, 49 F. Supp. 846 (W.D. La. 1943) and *Coggins v. Gregorio*, 97 F.2d 948 (10th Cir. 1938). The court therefore concluded that the revenues at issue were not "rent . . . produced by [the property]. *Id.* The court went on to find, however, that hotel receipts were "revenues" therefrom," noting that the revenues paid by its guests are, like rent, paid for the use of the property. In that sense, they, like rent, are produced by the property.[3]

This Court has also considered the particular issue at bar, although cursory, in its opinion of March 6, 1990, in *In the Matter of Thomas Jefferson Construction, Pelican Homestead and Savings Association v. Thomas Jefferson Construction Corporation and Progressive Bank and Trust*, Bankruptcy No. 86-03431, Adversary No. 88-0306. One of the issues sought to be decided by the plaintiff in its complaint was the determination of ownership of rents and revenues produced by the hotel owned by Debtor. After examining *Pioneer Bank*, this Court noted that *Pioneer Bank* lent support to its finding that proceeds generated from daily room rentals of a lodging facility constituted "revenues" under the plaintiff's security documents.[4] *Id.* at 29.

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[3] The court also pointed out that the mortgage at issue in the case expressly covered all property, movable and immovable, "used in connection with the operation of the . . . property."

[4] This Court points out that in its opinion in *Thomas Jefferson Construction* the classification of the hotel receipts was not a primary issue as in the case at bar. Moreover the pertinent clause in the collateral mortgage referred to a pledge of "all of the rents and revenues". Therefore, the distinction between "rents" and "revenues" pointed out by the Supreme Court in *Pioneer Bank* did not affect the outcome of the *Thomas Jefferson Construction* matter.

Under the doctrine of *Butner v. United States*, this Court is bound by Louisiana law on the issue of issue of whether hotel receipts fall within the classifications of security listed in the security agreements. Under the law of this state, as expounded in *Pioneer Bank*, hotel receipts are classified as "revenues." The assignment of rents in the collateral mortage extends to "revenues" of any leases of the property. "Leases" are defined to include the "use" or "occupancy" of property. Accordingly, as revenues from the use or occupancy of the mortgaged property, the hotel receipts at issue are subject to FSA's security interest. This conclusion is consistent with other bankruptcy courts' treatment of this issue based upon state law. *See In re Mid City Associates*, 114 B.R. at 641-42.[6]

Finally, the issue of FSA's perfection of its post-petition security interest in the revenues must be addressed. Upon the Debtor's filing of its petition in bankruptcy on February 25, 1991, the automatic stay prevented any act by FSA to "create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362 (a)(4). Further, 11 U.S.C. § 544(a) allows T-H New Orleans, as Debtor in Possession, to assume the status of a lien creditor or bona fide purchaser and to avoid an assignment of revenues that was not perfected at the time of the filing of the bankruptcy petition. *In re C.G. Chartier Construction, Inc.*, 126 B.R. 956, 958 (E.D. La. 1991) *citing In re Casbeer*, 793 F.2d 1436, 1443 (5th Cir. 1986); 11 U.S.C. § 1107).

Under 362(b)(3), however, the filing of a petition in bankruptcy does not operate as a stay of any act to perfect an interest in property to the extent that the trustee's

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[6] As this Court finds that the hotel receipts fall within the assignment of revenues, this Court will not address whether the hotel receipts could also fall within the assignment of accounts receivable.

avoidance powers are subject to 11 U.S.C. § 546(b). This section states:

> "the rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or the commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of such filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

11 U.S.C. § 546(b).

Accordingly, in order for FSA to escape having its interest in the revenues voided under Section 544(a), Louisiana law must permit a creditor to enforce a security interest in revenues against an entity [in this case T-H New Orleans as Debtor in Possession] that acquired rights to the revenues before the creditor perfected." *In re Chartier Construction*, 126 B.R. at 959.

Louisiana law permits contractual provisions to alter or modify the priority of liens. *T.D. Bickham Corp. v. Hebert*, 432 So.2d 228, 231 (La. 1983). Here, the Debtor has also agreed not to alienate and encumber FSA's collateral and, therefore, the parties have agreed in their contracts to alter the order of lien priorities. The Loan Agreement provides, "The Borrower shall not encumber, pledge, mortgage, convey, sell, transfer or assign (as security or otherwise) any or all of its estate and interest in and to the Hotel". Exhibit A at § 4.21. "Hotel" is defined to mean, "the Hotel Property, together with the improvements, personal property, easements, rights and other property described as the 'Mortgaged Property'

in the Mortgage relating to the Hotel Property being hereinafter referred to as a 'Hotel' . . ." Exhibit A at § 2.1(f)(2). The "Mortgage" is defined in the Loan Agreement to mean the Collateral Mortgage. *Id.* "Mortgaged Property" is defined in the Collateral Mortgage to include:

> (iv) any and all other security and collateral of any nature whatsoever, now or hereafter given by Mortgagor to secure the payment and performance of the Obligation (as defined herein);
>
> (vi) any right, title, interest or estate hereafter acquired by Mortgagor in any of the foregoing and in and to the Land, Buildings, Leasehold Estate, Fixtures, Personalty, Leases and Rents; and
>
> (vii) all cash and noncash proceeds of any and all thereof.

Exhibit D at p. 6. As evidenced by the above language, the parties agreed to alter the order of lien priorities and this agreement extended to all of the collateral. Thus, this Court finds that Louisiana law permits FSA to enforce its security interest in the revenues against T-H New Orleans, who as debtor in possession, acquired rights in the revenues prior to FSA's perfection.

Furthermore, this Court finds that FSA's 546(b) notice given on March 19, 1991, provided sufficient notice under § 546(b) to allow FSA to perfect its interests in the revenues post petition, effective on the date the notice was filed. *In re Chartier Construction,* 126 B.R. at 959 (E.D. La. 1991). Thus, this Court finds that FSA perfected its security interest in the revenues on March 19, 1991, when it filed its § 546(b) notice. The filing of this notice gave the earliest notice to segregate the revenues precluding the Debtor's further use of such funds. Therefore, from the time of the Debtor's default until March 19, 1991, the revenues collected by the Debtor were not subject to FSA's privilege. Accordingly, FSA's motion to segregate hotel receipts from the date of March

19, 1991 forward is Granted. Counsel are to confer and subsequently submit to this Court an appropriate adequate protection order concerning FSA's cash collateral. An appropriate Order will be entered.

New Orleans, Louisiana, this 23rd day of March, 1992.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

Number 91-10681

Chapter 11

IN THE MATTER OF
T-H NEW ORLEANS LIMITED PARTNERSHIP,
Debtor

ORDER

This matter came before the Court as a hearing on the motion of Financial Security Assurance, Inc. ("FSA") for segregation of hotel receipts, or alternatively, for adequate protection. The Debtor in this matter, T-H New Orleans Limited Partnership ("T-H New Orleans" or "the Debtor") opposes the motion. After considering the argument of counsel at hearing, the evidence submitted, the memoranda submitted by the parties, the applicable law, and in accordance with the foregoing Memorandum Opinion,

IT IS ORDERED that FSA's motion for segregation of hotel receipts is Granted.

IT IS FURTHER ORDERED that such hotel receipts be segregated from March 19, 1991 forward.

IT IS FURTHER ORDERED that counsel for FSA and the Debtor confer and subsequently submit to this Court an appropriate adequate protection order concerning FSA's cash collateral.

New Orleans, Louisiana, this 23rd day of March, 1992.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U.S. Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Case No. 91-10681-THK

Chapter 11

IN RE T-H NEW ORLEANS LIMITED PARTNERSHIP

ORDER

The Court previously granted the motion of Financial Security Assurance Inc. ("FSA") for segregation of hotel receipts, or alternatively, for adequate protection pursuant to its Memorandum Opinion and its Order, both dated March 23, 1992 (hereinafter collectively, the "March 23 Order"). In the March 23 Order, this Court required that counsel for FSA and counsel for the Debtor confer and subsequently submit to this Court an appropriate adequate protection order concerning FSA's cash collateral. This is that adequate protection order. Therefore,

IT IS ORDERED that the Debtor's hotel receipts from March 19, 1991 are the cash collateral of FSA (the "Cash Collateral") and that they be segregated and used in accordance with the terms of this Order.

IT IS FURTHER ORDERED that the Debtor be and it is hereby permitted to use FSA's Cash Collateral subject to the following requirements and restrictions:

a) The Debtor shall use all reasonable efforts to collect fully and promptly all outstanding prepetition and all post-petition income and accounts receivable.

b) The Debtor shall establish a separate account (the "Cash Collateral Account"), which shall be an interest bearing account, and shall deposit into the Cash Collateral Account all Cash Collateral on a daily basis except that the Debtor shall be entitled to retain no greater than $9000.00 as its opening cash balance on each business day. Monthly, not later than the tenth day of the following month, the Debtor shall provide to FSA a reconciliation of the use of such cash for the prior month. The cash currently on hand or in banks in any other accounts, which constitute Cash Collateral pursuant to the March 23 Order, shall also be deposited forthwith in the Cash Collateral Account.

c) Until such time as the Debtor and FSA have agreed upon an operating Budget for the Hotel, but in any event not later than May 8, 1992 or such later date as may be fixed by the Court, the Debtor shall be entitled to use this Cash Collateral Account to pay the ordinary and reasonable post-petition expenses of operating the Hotel not to exceed the sum of $75,000 per week, plus the ordinary and reasonable cost of insurance and taxes to the extent not covered by the foregoing, unless Debtor and FSA consent to a larger sum. Non-operating expenses shall not be paid from the Cash Collateral or Cash Collateral Account, except with the consent of FSA or by order of the Court.

d) Debtor will not make payments from the Cash Collateral or Cash Collateral Account to any related entity (i.e., any entity controlled directly or indirectly by Stanley Tollman and/or Monty Hundley), except to Tollman-Hundley Management Services, Inc., for expenses incurred by

Tollman-Hundley Management Services, Inc., in performing its duties as operator of the hotel, which expenses are directly and exclusively related to the hotel or which are equitably allocable to the hotel. Overhead expenses of Tollman-Hundley Management Services, Inc., shall not be paid by the Debtor. To the extent any right exists, FSA shall have the right to seek reimbursement of any payments made by the Debtor to any related entity during the pendency of these proceedings other than those which have been made in accordance with the Management Agreement dated June 14, 1988 between the Debtor and Tollman-Hundley Management Services, Inc.

e) At the earliest practical date, but in any event not later than May 8, 1992, or such later date as may be fixed by the Court, the Debtor shall present to FSA for approval, an Operating Budget for the balance of 1992 in monthly increments. For 1993 and any subsequent years, the Debtor shall submit its proposed Operating Budget, broken down in monthly increments, to FSA no later than the 1st day of December of the prior year. FSA shall have 15 days in which to approve or disapprove any line item contained in any proposed Operating Budget. The Operating Budget proposed by the Debtor shall be deemed approved by FSA if the Debtor does not receive from FSA within such 15 day period, written disapproval of any line item contained in the Operating Budget. In the event the Debtor does not obtain FSA's consent, the Debtor must secure court approval of any operating expenses not approved by FSA.

f) In order to reduce its obligations to FSA, after April 30, 1992, or such later date as may be fixed by the Court, the Debtor shall pay over to

FSA its accumulated Cash Collateral and, thereafter, on a monthly basis, any amounts in the Cash Collateral Account that exceed the requirements of the pre-approved Operating Budget.

g) As further adequate protection, Debtor shall obtain and maintain insurance covering the Hotel and its operations in accordance with the Loan Agreement or Collateral Mortgage, otherwise in amounts and from insurers satisfactory to FSA.

i) For purposes of review and inspection, FSA shall be given complete access to the physical premises of the Hotel as well as any books and records relating to the Hotel upon reasonable notice to the Debtor. In addition, the Debtor shall (i) provide an accounting of the Debtor's use of all income derived from the Hotel since March 19, 1991, and (ii) upon reasonable notice, permit examinations, pursuant to Bankruptcy Rule 2004, of such officers agents or employees of the Debtor and the Hotel as reasonably requested by FSA. At its expense, FSA shall have the right to audit or cause to be audited the books and records of the Debtor with respect to post-petition income and expenses of the Debtor.

j) The terms of this Order and the March 23 Order and the relief granted in this Order and the March 23 Order shall not impair the rights, if any, of the Debtor or of FSA as a secured creditor of the Debtor, including, without limitation, any rights granted by the Bankruptcy Code to FSA as a creditor and party in interest in this bankruptcy case. Nothing contained herein shall be deemed: (1) an agreement by FSA or an order of the Court subordinating the secured claim of FSA to the administrative expenses of this case or any superseding case under Chapter

7 of the Bankruptcy Code or (2) an agreement by the Debtor as to the correctness and/or validity of this Order and/or the March 23 Order.

k) FSA's and Debtor's consent to this Order is without prejudice to their rights to seek any relief to which they may be entitled, including, without limitation, any rights to appeal form this Order and/or the March 23 Order.

l) If FSA in good faith determines that the Debtor is not complying with the terms and conditions of this Order, it may revoke its consent to the use of Cash Collateral authorized herein by giving written notice of such revocation to the Debtor or its counsel at least 10 days in advance of the effective date of such revocation. The Debtor's authority to use the Cash Collateral Account shall terminate on the effective date stated in the written notice. If such consent is revoked by FSA, then FSA or the Debtor may seek an expedited hearing in this Court for such relief as either deems appropriate. If such consent is revoked by FSA, the Debtor shall continue to employ its best efforts to collect its income and accounts receivable and shall continue to deposit into the Cash Collateral Account all revenues from the operation of the Hotel until further order of this Court.

New Orleans, Louisiana, this 1st day of May, 1992.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U.S. Bankruptcy Judge